



22 CFR Part 121

[Public Notice: 11986]

RIN 1400-AF27

International Traffic in Arms Regulations: U.S. Munitions List Targeted Revisions

AGENCY: Department of State.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of State (the Department) amends the International Traffic in Arms Regulations (ITAR) to remove from U.S. Munitions List (USML) Category XI certain high-energy storage capacitors and to clearly identify the high-energy storage capacitors that remain in USML Category XI.

DATES: Effective date May 21, 2023.

Send comments by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may submit comments to the Department of State by any of the following methods:

- Visit the Regulations.gov Web site at: <http://www.regulations.gov> and search for the docket number DOS-2023-0003.
- Email: DDTCPublicComments@state.gov. Commenting parties must include RIN 1400-AF27 in the subject line of the email message.
- All comments should include the commenter's name, the organization the commenter represents, if applicable, and the commenter's address. If the Department of State is unable to read a comment for any reason, and cannot contact the commenting party for clarification, the Department of State may not be able to consider your comment. After the conclusion of the comment period, the Department of State will publish a Final Rule (in which it will address relevant comments) as expeditiously as possible.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Weil, Office of Defense Trade Controls Policy, Department of State, telephone (202) 571-7051; e-mail

DDTCCustomerService@state.gov SUBJECT: ITAR Amendment – USML Targeted Revisions (RIN 1400-AF27)

SUPPLEMENTARY INFORMATION: The Department of State’s Directorate of Defense Trade Controls (DDTC) administers the ITAR (22 CFR parts 120 through 130) to regulate the export, reexport, retransfer, and temporary import of, and brokering activities related to certain items and services. The articles, services, and information subject to the jurisdiction of the Department of State under the ITAR (e.g., “defense articles” and “defense services”) are identified on the USML at ITAR § 121.1. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other Department or Agency of the U.S. Government are subject to the Export Administration Regulations (EAR, 15 CFR parts 730 through 774, which includes the Commerce Control List (CCL) in Supplement No. 1 to part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. This rule does not modify the list of defense articles subject to permanent import control by the Attorney General, as enumerated on the U.S. Munitions Import List at 27 CFR part 447.

The Department seeks to control on the USML those articles and services that provide a critical military or intelligence advantage. The Department undertakes these revisions pursuant to the discretionary statutory authority afforded the President in section 38(a)(1) of the AECA and delegated to the Department of State in Executive Order 13637, to control the export and temporary import of defense articles and defense services in furtherance of world peace and the security and foreign policy of the United States and to designate those items which constitute the USML. The Department, informed by consultations with its interagency partners, determined the articles removed from the USML under this rulemaking no longer warrant control pursuant to the ITAR.

Targeted USML Revisions

With this rulemaking, the Department is removing from USML Category XI certain high-energy storage capacitors that it assesses have broad commercial application, are available internationally, and do not provide a critical military or intelligence advantage. The Department assesses that adding a 125-volt (125 V) voltage criterion for the high-energy capacitors described on the USML ensures the capacitors that remain warrant control on the USML. While adding the 125 V criterion to paragraph (c)(5), the Department is simultaneously reorganizing the paragraph to delineate each element of the control criteria more clearly and adding a note to explain those criteria.

These changes are warranted because the Department found that certain low-voltage high-energy storage capacitor technology has progressed such that many models that exceed the existing USML control criteria no longer provide a critical military or intelligence advantage. Although these lower-voltage capacitors meet the energy density and full energy life criteria, the technology for these lower-voltage capacitors is well understood, and the capacitors have been extensively integrated into commercial applications, such as Wi-Fi routers and civil aviation aircraft transponders. Further, comparable capacitors manufactured in other countries are widely available internationally without multilateral export restrictions placed on them.

The Department considered two methods of implementation for specifying this voltage criterion. First, the Department considered applying a voltage rating criterion, assessing it to be an industry-standard term used to describe a value for existing capacitors that is readily accessible to exporters and customers through the specifications typically provided by Original Equipment Manufacturers (OEMs). The Department assessed that this criterion would facilitate compliance and implementation. This approach also would be in keeping with the Department's intent to establish threshold criteria in language readily understood by practitioners. However, it is possible different OEMs determine voltage ratings using differing methodologies or underlying assumptions, which could produce significantly different ratings for equivalent

products. The Department assesses this drawback could be mitigated by clearly defining the term “voltage rating” in the regulation but would require more information to do so appropriately.

Second, the Department considered identifying the voltage performance capability of the capacitors, as performance capability can be empirically tested and is potentially less prone to misinterpretation. However, it is not clear to the Department how much additional testing would be required to confirm a given capacitor model’s capability or whether customers have ready access to that information to facilitate compliance.

In this interim final rule, the Department implements the 125 V criterion based on the voltage at which the capacitor is capable of operating, in order to allow for public comment on advantages or disadvantages of each approach and on potential definitions for “voltage rating” and “capable of.”

The Department further reaffirms a core concept for compliance programs:

When a commodity is described by a single criterion within a USML entry, it is imperative to evaluate the remaining criteria of the control to verify whether the commodity is described – even when the commodity was not intentionally designed to meet or exceed the control criteria.

Request for Comments

Consistent with its ongoing USML review process, the Department is requesting public comments on the revisions described in this rulemaking. The Department encourages the public to provide comments directly related to this rule and responsive to the questions described below. To facilitate timely review and assessment, comments should be provided in a concise sentence or paragraph, followed by supporting explanatory paragraphs and examples, with each distinct comment treated separately (as opposed to multiple comments in one paragraph or section). The Department requests comments focused on the following questions:

1. Please provide specific examples of any high-energy storage capacitors that exceed the 125 V threshold but fall under a 500 V threshold that you believe do not provide a critical military advantage.
2. What implementation challenges are presented by the use of either “capable of operating” or “voltage rating” to describe the voltage threshold?
3. Is there additional guidance that would be useful in parsing “capable of operating,” as used in this rule?
 - a. Is it sufficiently clear in the "capable of operating" implementation that the voltage capability is for steady-state, versus transient or surge, operating conditions?
 - b. Is it sufficiently clear in the 'capable of operating' implementation that the voltage capability does not vary based on circuit design margins?
4. Could a “voltage rating” criterion be implemented more easily and consistently? If so,
 - a. Do you assess that a sufficient definition of “voltage rating” would be “the value, based on the capacitor’s design, testing, and evaluation, that describes the maximum amount of continuous voltage that will not damage the capacitor”?
 - b. Is it sufficiently clear in the alternative 'voltage rating' implementation that the voltage rating is for steady-state, versus transient or surge, operating conditions?
 - c. Is it sufficiently clear in the alternative 'voltage rating' implementation that the voltage rating does not vary based on circuit design margins?
 - d. What would be the effect of adding a temperature criterion (e.g., “measured at or below 85 °C”) and is it accurate that the voltage rating of a capacitor only declines with an increase in temperature?

- e. Would a criterion such as “will not reduce the capacitor’s full energy life below 10,000 discharges” address the fact that each charge and discharge cycle likely inflicts some damage on a capacitor?
5. Are these revisions unclear in any way, or can they be more concisely stated? For example, please identify any:
 - Terms that you find ambiguous in definition or context
 - Constructions or language that vary from existing USML entries
6. Are there other technical issues directly related to this entry which the Department should address in a future rulemaking?

Comment Submissions

Instructions

Include the agency name and docket number or Regulatory Information Number (RIN) (1400-AF27) for all submissions related to this rulemaking. Relevant comments may be posted without substantive change to the DDTC website (www.pmdt.state.gov). Please remove any personal information, because the Department will not edit comments. Parties who wish to comment anonymously may do so by submitting their comments via www.regulations.gov, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Commenters are cautioned not to include proprietary, export-controlled, or other sensitive information that they are not comfortable making public in their comments. If such information would provide useful insight to the comment: (1) assemble that information in a separate document with proprietary markings; (2) include “Proprietary supplement on file with: [provide POC]” as the first line in the body of the email submission; (3) submit the public portion of the comment via e-mail; and (4) call DDTC at (202) 663-1282 to coordinate submission of the proprietary supplement.

Regulatory Analysis and Notices

Administrative Procedure Act

This rulemaking is exempt from section 553 (Rulemaking) and section 554 (Adjudications) of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(a)(1) as a military or foreign affairs function of the United States Government. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 30-day provision for public comment and a delayed effective date, without prejudice to its determination that controlling the import and export of defense articles and defense services is a military or foreign affairs function.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Department assesses that this rulemaking is not a major rule under the criteria of 5 U.S.C. 804. Moving the subject commodities to the jurisdiction of the EAR will reduce regulatory restrictions and compliance costs, particularly for U.S. exporters as well as some importers who source the subject commodities from abroad. This will not increase costs or prices and should have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. To the contrary, the rule is expected to reduce regulatory

compliance costs in the long term and facilitate U.S. manufacturers' competitiveness with foreign manufacturers of similar commodities. The Department does not, however, expect this change to have an annual effect on the economy of \$100 million or more.

Executive Orders 12372 and 13132

This rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been deemed a "significant regulatory action" by the Office of Information and Regulatory Affairs under Executive Order 12866.

This rule moves the export regulation of certain capacitors from the ITAR to the EAR. This action reduces the regulatory burden on those who export, temporarily import, retransfer, reexport, or perform brokering activities involving the subject capacitors. In particular, this action averts substantial regulatory burdens that would otherwise apply to supply chains that rely on the subject capacitors and commercial items into which the subject capacitors have been integrated or incorporated. As discussed in ITAR § 120.11(c), defense articles remain subject to the ITAR after incorporation or integration into an item not described on the USML, unless otherwise provided in the ITAR. The Department assesses that continuing to subject these capacitors (which are used in a wide swath of everyday commercial items, including commercial aircraft and Wi-Fi equipment) to the ITAR is unnecessary and would have significant negative

consequences for global commerce, including the grounding of civil aircraft and the disruption of supply chains.

In implementing this rule, the Department is also revising USML Category XI(c)(5) to clarify its structure and explain certain terms used therein to minimize the potential for uncertainty.

The Department assesses that the benefits of this rulemaking outweigh any costs, that modifying the USML in this manner is the most cost-effective method to achieve the Department's regulatory objectives on this matter, and that doing so will result in a net reduction of the burden on the regulated community.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 121

Arms and munitions, Classified information, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is amended as follows:

PART 121 – THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 continues to read as follows:

Authority: 22 U.S.C. 2752, 2778, 2797; 22 U.S.C. 2651a; Sec. 1514, Pub. L. 105-261, 112 Stat. 2175; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

2. In § 121.1, under Category XI, revise paragraph (c)(5) as follows:

§ 121.1 The United States Munitions List.

* * * * *

Category XI – Military Electronics

* * * * *

(c) * * *

(5) High-energy storage capacitors that:

- (i) Are capable of operating at greater than one hundred twenty-five volts (125 V);
- (ii) Have a repetition rate greater than or equal to six (6) discharges per minute;
- (iii) Have a full energy life greater than or equal to 10,000 discharges at greater than 0.2 Amps per Joule peak current; and
- (iv) Have any of the following:
 - (A) Volumetric energy density greater than or equal to 1.5 J/cc; or
 - (B) Mass energy density greater than or equal to 1.3 kJ/kg;

Note to paragraph (c)(5): *Volumetric energy density* is Energy per unit Volume. *Mass energy density* is Energy per unit Mass, sometimes referred to as *Gravimetric energy density* or *Specific energy*. *Energy* ($E = \frac{1}{2}CV^2$, where C is Capacitance and V is the Voltage rating) in these calculations must not be confused with useful energy or extractable energy.

The Under Secretary of State for Arms Control and International Security, Bonnie Jenkins, having reviewed and approved this document, is delegating the authority to electronically sign

this document to Jae E. Shin, who is the Director of the Office of Defense Trade Controls Compliance within the Directorate of Defense Trade Controls, for purposes of publication in the *Federal Register*.

Jae E. Shin,
Director,
Office of Defense Trade Controls Compliance,
Department of State.

Billing Code: 4710-25

[FR Doc. 2023-08825 Filed: 4/26/2023 8:45 am; Publication Date: 4/27/2023]